BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RODNEY S. SMITH Claimant	)	
VS.	)	
LAFARGE NORTH AMERICA Respondent	)	Docket No. 1,052,442
AND	)	
INSURANCE CO. OF STATE OF PA Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 5, 2013, Review and Modification Award entered by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on November 19, 2013. Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Steven J. Quinn of Kansas City, Missouri, appeared for respondent.

The ALJ found claimant had an increase in work disability by losing his job with a subsequent employer, ZTM, Inc.(ZTM), and determined claimant suffered a 100 percent wage loss yielding a 50 percent work disability. The ALJ found claimant is entitled to permanent partial disability benefits beginning on April 1, 2013, the date he was terminated from ZTM.

Further, in a preliminary Order in a separate docketed claim dated July 11, 2013, the ALJ found claimant sustained a back injury out of and in the course of his employment with ZTM on March 29, 2013, and ordered ZTM to provide both medical treatment and temporary total disability benefits.[1]

[1] *Smith v. ZTM, Inc.*, Docket No. 1,065,254.

The Board has considered the record and adopted the stipulations listed in the Award.[2]

ISSUES

Claimant alleged that from October 1, 2012, through April 1, 2013, he had a 31 percent wage loss as he was earning less at ZTM than he had earned while working for respondent. Claimant did not have a vocational report or task loss opinion, but calculated a work disability of 15.5 percent based upon a 31 percent wage loss. Respondent stated on the record it does not object to this allegation of work disability.

However, respondent argues claimant sustained a new injury to the body as a whole while employed by ZTM, thus opening the door for a new claim of work disability. Respondent maintains claimant cannot receive concurrent awards of work disability. Respondent argues principles of both law and equity require the work disability be owed from the last injurious exposure, or ZTM.

Claimant filed a subsequent workers compensation claim against ZTM currently pending before ALJ Clark. Claimant argues the outcome of the subsequent claim is unknown and cannot be used as a defense against an award of work disability benefits in this claim. Additionally, claimant contends the last injurious exposure rule is not applicable in this instance as the cases are not consolidated, nor has there been a final determination by the ALJ in both cases. Claimant also noted his claim with respondent occurred prior to changes to the Workers Compensation Act in 2011, while his claim with ZTM occurred subsequently.

The parties agreed the ALJ erred in his calculation of benefits in his August 5, 2013 Award:

> At the original functional impairment settlement hearing [respondent] paid [permanent partial impairment (PPI)] in the amount of $16,019.79 representing 35.275 weeks of [permanent partial disability]. Date of injury was 05/27/10. No [temporary total disability] was paid.
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> [Respondent] then paid work disability during a period of time when claimant was laid off from 12/20/11 - 03/31/12 in the amount of $6,840.33. There were additional amounts paid out totaling $3,049.23. Therefore, at this point [respondent] has paid out $25,909.35 of a potential $100,000 leaving potential liability of $74,090.65.

[2] Due to clerical error, Stipulation No. 2 of the ALJ's Award incorrectly notes the parties settled for a functional impairment of 10 percent for a total amount of $10,862.95. It should state the parties settled for a functional impairment of 8.5 percent for a total amount of $16,019.79.

> Under the award [respondent] owes work disability during the time claimant was working for ZTM and not earning comparable wage. The period of work disability while working at ZTM was only from October 1, 2012 through April 1, 2013 a period of 26.14 weeks x $546.00 = **$14,242.44**.
>
> In addition, claimant's period of work disability following his termination from ZTM is from April 2, 2013 - August 5, 2013 (at the time of the Award and continuing), a period of 18.14 weeks x $546.00 = **$9,904.44**.
>
> Therefore, even if the Board finds that [respondent] is liable for work disability following claimant's termination from ZTM, the [respondent] liability, in addition to amounts already paid would be:
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> | | |
> |---|---|
> | $16,019.79 | PPI |
> | $ 14,272.44 | W/D while working |
> | $ 9,904.44 | W/D post termination |
> | $40,196.67 | Total due as of date of Award |
> | $16,019.79 | PPI already paid |
> | **$24,176.88** | **Net total due as of date of Award**[3] |

Claimant noted he "agree[s] to respondent's calculations as to what is due and owing if the Board affirms Judge Clark's Award."[4]

The issues for the Board's review are:

1. Did the ALJ err in his calculations as to all periods of work disability?

2. Was claimant's work disability the result of a subsequent work-related and compensable injury while in the employ of a subsequent liable employer?

FINDINGS OF FACT

Claimant was employed by respondent as a truck driver/laborer on May 27, 2010, when he sustained a work-related injury after stepping into a hole and falling. Claimant was treated with medication, physical therapy, and work restrictions. Claimant was released from care in March 2011.

The parties, after a settlement hearing on September 12, 2011, agreed upon a running award for an 8.5 percent impairment to the body as a whole. Claimant was paid functional impairment benefits and reserved the right to review and modification and future medical treatment upon proper application to the Division.

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[3] Respondent's Brief at 7-8 (filed Sept. 13, 2013).

[4] Claimant's Brief at 5 (filed Oct. 14, 2013).

Claimant continued to work for respondent until December 19, 2011, when he was laid off. Claimant returned to work for respondent on April 1, 2012, and worked until his termination on August 15, 2012. Per agreement, claimant was paid permanent partial disability benefits for the periods of time he was not working.

On October 1, 2012, claimant began employment with ZTM, where he assembled a range of aircraft parts varying from 4 inches long to 5 feet long. The beams claimant assembled were made of steel and weighed approximately 15 pounds.

On Friday morning, March 29, 2013, claimant was stacking pallets to prepare an area for cleaning, a task outside his regular job duties. When claimant bent over to move a pallet, he felt a pain in his back. Claimant testified he had been cleaning the area for approximately two hours and had stacked approximately 40 wooden pallets before he noticed the pain.

Claimant went to the emergency room and followed up with Dr. Nugent for treatment. Claimant testified Dr. Nugent took him off work for one week following the incident. In a letter dated April 23, 2013, ZTM informed claimant his last day worked was April 1, 2013, and that he had not provided a doctor's release or restrictions per ZTM's request. Claimant was unable to perform his job following his injury. Therefore, ZTM terminated claimant's employment April 23, 2013.

Claimant has not worked since April 1, 2013. He stated he continues to have pain in his back on a daily basis, which he rated at a level of 7 on a 1-10 pain scale. In addition to back pain, claimant testified he experiences numbness down the right side of his leg.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-510e(a) states, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.
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> . . . .

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The most fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.[5] The legislature is presumed to have expressed its intent through the language of the statutory scheme, and when a statute is plain and unambiguous, the court must give effect to the legislative intention as expressed in the statutory language.[6]

When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction.[7]

Absent a specific statutory provision requiring a nexus between the wage loss and the injury, the Board is not to read into the statute such a requirement.[8]

K.S.A. 2009 Supp. 44-528 states, in part:

> (c) The number of reviews under this section shall be limited pursuant to rules and regulations adopted by the director to avoid abuse.
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> (d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

K.A.R. 51-19-1 states, in part:

> (c) Review and modification applications should not be made more than once during any six-month interval except in highly unusual situations.

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[5] *Winnebago Tribe of Nebraska v. Kline,* 283 Kan. 64, 77, 150 P.3d 892 (2007).

[6] *Hall v. Dillon Companies, Inc.,* 286 Kan. 777, 785, 189 P.3d 508 (2008).

[7] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 607-08, 214 P.3d 676, 678 (2009), citing *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).

[8] *Tyler v. Goodyear Tire & Rubber Co.*, 43 Kan. App. 2d 386, 391, 224 P.3d 1197, 1201 (2010).

ANALYSIS

K.A.R. 51-19-1(c) states that a review and modification may only be made once every six months except in highly unusual situations. The record contains no argument by claimant that this regulation should not apply. Claimant filed four applications for review and modification. The first application, which does not apply to this proceeding, was filed on January 11, 2012. The second application was filed on September 5, 2012, after claimant was terminated from employment by respondent. The third application was filed January 16, 2013, after claimant was hired by ZTM, providing a basis for work disability. The third application was filed with no statement of highly unusual circumstances and is invalid. The fourth application was filed on April 17, 2013, after claimant was terminated from employment at ZTM.

The respondent argues claimant is not entitled to wage loss benefits because the wage loss is due to a subsequent work-related injury with a different employer. While it makes sense that a claimant would not be entitled to wage loss under these circumstances, there is no exception contained in the statute that applies. Based upon the rules of statutory construction contained in *Bergstrom*[9] and its progeny, it does not matter why a person suffers a wage loss. The claimant is entitled to work disability for periods during which he earned less than 90 percent of his average weekly wage.

Claimant's stipulated average weekly wage at the time of the original settlement was $681.17, not including fringe benefits. The resulting compensation rate equals $454.14 per week. The parties have stipulated to a post-termination wage of $882.17 per week. The maximum compensation rate in effect for claimant's May 27, 2010, accident date is $546.00 per week.

The claimant has presented no evidence of task loss. During any period of permanent partial general disability during which claimant earns less than 90 percent of his average weekly wage, the percentage of wage loss will be averaged with a 0 percent task loss.

While claimant has agreed to the above noted calculations suggested by respondent, the suggested calculations are not binding on the Board if not supported by the record. The Board's method of calculating the award when either the functional impairment or work disability changes is to calculate the award, or recalculate the award if benefits have already been paid, based on a different disability rating, using the new or latest disability rate as though no permanent partial benefits had been paid or were payable under any earlier disability rate. The award so calculated gives the total number of weeks and amounts payable for the award. If permanent partial benefits have previously been paid based on a different rate of disability, respondent is entitled to a credit

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[9] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, 214 P.3d 676, 678 (2009).

for those payments. The new work disability is calculated, and respondent is given credit for the weeks of compensation, either functional impairment or work disability, previously paid. The Board does not and has never given credit to a respondent for weeks during which claimant is working at a comparable wage.[10]

In *Bohanan*,[11] the Court of Appeals affirmed this method of calculating permanent partial general disabilty. In *Bohanan*, the respondent school district argued entitlement to credit for some 36.14 weeks during the time Bohanan was working at her parking lot attendant position, with those weeks to be deducted from the total number of weeks due for the new work disability. The Court of Appeals found the Board's method of calculating the award, which rejected respondent's request, to be reasonable. The decision did not say the Board's method was the only method, only that it was reasonable.

In *Wheeler*,[12] the Court of Appeals again affirmed the Board's method of calculating awards. The court reasoned the credit for the disability benefits paid should be given to the respondent, whether those benefits are for a functional impairment or work disability. The court rationalized the purpose of limiting work disability benefits to those injured workers who cannot earn comparable wages was designed, in part, to encourage employers to return injured employees to work, even at accommodated positions.[13] The *Wheeler* court gave the employer credit for the permanent partial disability benefits it had paid. No credit was allowed for weeks during which the claimant was earning a comparable wage.

The Court of Appeals in *Ponder-Coppage*[14] again affirmed the Board's method of calculating a change in work disability when a review and modification was requested under K.S.A. 44-528. The court held that, under K.S.A. 44-528(d), the effective date of the modification award is the date the increase or diminishment actually occurred, with the six-month prior limitation being enforced with review and modification requests. The *Ponder-Coppage* court acknowledged the language in K.S.A. 44-510e which allows compensation, not to exceed 415 weeks "following the date of such injury . . . ,"[15] but still limited the credit effective as of the date the increase or decrease actually occurred.

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[10] *Wann v. Angel Arms*, No. 1,060,503, 2013 WL 6382911 (Kan. WCAB Nov. 19, 2013).

[11] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[12] *Wheeler v. Boeing Co.*, 25 Kan. App. 2d 632, 967 P.2d 1085 (1998).

[13] *Id.* at 637.

[14] *Ponder-Coppage v. State of Kansas*, 32 Kan. App. 2d 196, 83 P.3d 1239 (2002).

[15] *Id.* at 198.

In *Bergstrom,* the Kansas Supreme Court held:

> When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction. *Graham v. Dokter Trucking Group*, 284 Kan. 547, 554, 161 P.3d 695 (2007).[16]

K.S.A. 2009 Supp. 44–510e(a) states in pertinent part, "In any case of permanent partial disability under this section, the employee will be paid compensation for not to exceed 415 weeks following the date of such injury. . . ." This provision merely limits an injured worker to a maximum of 415 weeks of permanent partial disability payments following his or her date of injury.

The Board agrees that the ALJ failed to correctly calculate the amounts of permanent partial general disability. As the Board has directed, the ALJ recalculated the award using the latest disability rate as though no permanent partial benefits had been paid. The previously paid weeks of permanent partial disability were then credited against the new award. However, the ALJ incorrectly calculated benefits for changes in the compensation rate after claimant was laid off by respondent and when he worked for ZTM.

Prior to the application for review and modification, respondent paid claimant 35.28 weeks of permanent disability compensation for a total of $16,019.79 by agreement at a settlement hearing. Respondent voluntarily paid claimant 14.71 weeks of permanent disability for an an additional $6,840.33. The total paid by respondent prior to claimant's application for review and modification is 49.99 weeks of compensation for a total of $22,860.12

For the purposes of determining claimant's entitlement to permanent partial general disability and pursuant to K.A.R. 51-19-1(c) , the Board will focus on three time periods. From August 16, 2012, through September 30, 2012, a period of 6.57 weeks, claimant did not work and experienced a 100 percent wage loss and no task loss, resulting in a 50 percent work disability. Claimant is entitled to $546.00 per week for 6.57 weeks until September 30, 2012, which is $3,587.22.

From October 1, 2012, through April 1, 2013, a period of 26.14 weeks, claimant was employed by ZTM, changing his circumstances and reducing his entitlement to permanent partial general disability from 50 percent to 15.5 percent. For this period, claimant is entitled to 15.5 percent of 415 weeks, which is 64.33 weeks, less the 56.66 weeks

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[16] *Bergstrom v. Spears Mfg. Co.,* 289 Kan. 605, 607-608, 214 P.3d 676 (2009).

previously paid or owed by respondent, which is 7.67 weeks. Claimant is entitled to $546.00 per week for 7.67 weeks for this time period, which is $4,187.82.

Effective April 2, 2013, to present, claimant is not working and experiences a 100 percent wage loss and a 0 percent task loss, which results in a 50 percent work disability. For this period, claimant is entitled to 50 percent of 415 weeks, which is 207.5 weeks, less the 64.33 weeks previously paid or owed by respondent, for a total of 143.17 weeks. Subject to the maximum compensation provisions contained in K.S.A. 2009 Supp. 44-510f, claimant is entitled to $546.00 per week for 143.13 weeks for this time period, which is $78,170.82. From April 2, 2013, through December 20, 2013, claimant is entitled to 37.43 weeks of compensation at the rate of $546.00 per week, which is $20,436.78.

CONCLUSION

The claimant is not barred from receiving permanent partial general disability benefits in excess of his functional impairment because his wage loss resulted from a new and separate injury. The ALJ incorrectly calculated the award.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated August 5, 2013, is modified. Claimant is entitled to an award of $100,000.00. As of December 20, 2013, claimant is entitled to $51,071.94, less amounts previously paid. Thereafter, claimant is entitled to weekly compensation payments in the amount of $546.00 until a maximum of $100,000.00 is paid or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

CONCURRING OPINION

The undersigned concurs with the majority with regard to claimant's entitlement to an award in the amount of $100,000. However, the undersigned does not agree with the manner in which the majority calculates the award.

K.S.A. 2009 Supp. 44–510e(a) states, in part:

> If there is an award of permanent disability as a result of the compensable injury, there will be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee will be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44–528 and amendments thereto.
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> . . . .
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> An employee will not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Because permanent disability is presumed to exist immediately after the injury, and there is a limit of 415 weeks during which a claimant is entitled to permanent partial general disability benefits, the time during which claimant does not qualify for benefits must be subtracted from the 415 weeks. The employer is entitled to a credit for periods during which claimant earns wages equal to 90 percent of the average weekly wage during the 415 week period following the date of accident. On review and modification of a prior award where a claimant is entitled to an increase in disability, the number of weeks during which claimant earns wages equal to 90 percent of the average weekly wage should be subtracted from the 415 week maximum prior to calculating permanent partial disability benefits.

_____
HONORABLE SETH G. VALERIUS
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